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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:

- ☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA First Trust Deed Fund, LLC

Case No. BK-S-06-10725-LBR
 Case No. BK-S-06-10726-LBR
 Case No. BK-S-06-10727-LBR
 Case No. BK-S-06-10728-LBR
 Case No. BK-S-06-10729-LBR

Chapter 11

Jointly Administered under
Case No. BK-S-06-10725-LBR

REPLY IN SUPPORT OF MOTION FOR
ORDER TEMPORARILY ALLOWING THE
CLAIM OF DEL AND ERNESTINE BUNCH
FOR VOTING PURPOSES

Date of Hearing: December 20, 2006

Time of Hearing: 1:30 p.m.

Judge: Hon. Linda B. Riegler

Del and Ernestine Bunch ("Bunch"), through their counsel the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson, submit this reply in support of the Motion for Order Temporarily Allowing the Claim of Del and Ernestine Bunch for Voting Purposes. In its Objection, USA Commercial Mortgage ("USACM"), contends that the Bunches' claim in the amount of \$11,358,662.28 should be disallowed in its entirety for voting purposes on the grounds that the Bunches allegedly received preferential transfers within ninety (90) days of the

1 Bankruptcy Petition in the amount of \$217,000.00 in February 2006, and \$196,000.00 in March
 2 2006, for a total of \$413,000.00. This amount is approximately .036% of the entire outstanding
 3 indebtedness.

4 In this Reply, the Bunches will demonstrate that the payments received from USACM
 5 within 90 days of the bankruptcy petition were consistent with ordinary course of payments
 6 received by the Bunches by electronic transfer for the previous five years. The Bunches will also
 7 demonstrate that the harsh interpretation of Section 502(d) by the Bankruptcy Courts in Texas
 8 are uniformly adopted by other bankruptcy courts and in fact contrary to the positions taken by
 9 other bankruptcy courts. Finally, the Bunches will demonstrate that the authorities cited by
 10 USACM relative to Section 502(c) are distinguishable primarily on the grounds that the cited
 11 cases estimating claims at zero for voting purposes involved situations where the claims filed by
 12 creditors were contingent, unliquidated and highly speculative claims. In this case, the claim of
 13 the Bunches is for a sum certain pursuant to a Promissory Note and in no way is contingent or
 14 unliquidated.

15 LEGAL ARGUMENT

16 A. The Bunches have Provided Evidence Regarding an Ordinary Course of Business 17 Exception under Section 547(c)(2)

18 The first argument raised in USACM's opposition to the Motion for Temporary
 19 Allowance of Claim is that the Bunches received preferential transfers within 90 days of the
 20 filing of the Bankruptcy Petition and failed to provide any evidence during a recent 2004
 21 Examination that the payments were made in the ordinary course of business pursuant to Section
 22 547(c)(2). This statement is simply false.

23 At Mr. Bunch's 2004 Examination conducted on less than 48 hours prior notice, Mr.
 24 Bunch voluntarily produced bank statements for the years 2000 through March of 2006. Those
 25 bank statements are attached to the 2004 Transcript as Exhibits J through R. These bank
 26 statements demonstrate that since approximately July of 2000, USACM has made regular
 27 monthly interest payments on or about the tenth of each month to the Bunches pursuant to the
 28 terms of the Promissory Note that evidence the claim of the Bunches in this bankruptcy case.

1 The bank statements further demonstrate, as testified by Mr. Bunch, that aside from the first
 2 three or four payments under the Promissory Note, all payments by USACM were made by wire
 3 transfer to the Bunches' bank account.

4 Regarding the statements that the note matured and that payments cannot be considered
 5 ordinary, Mr. Bunch testified that with the assessment of the late charge and agreement by
 6 USACM to pay the default rate that the note would be extended an additional year to February
 7 2006, rather than accelerated and deemed to be entirely due and owing. Mr. Bunch further
 8 testified that in February 2006, he agreed to further extend the due date so long as another later
 9 charge was assessed and interest continued to accrue at the default rate. Based upon USACM's
 10 agreement to this effect, the note was again extended. In both instances, USACM continued to
 11 pay the regular monthly interest only payments by wire transfer according to the terms of the
 12 note.

13 This overwhelming evidence coupled with Mr. Bunch's uncontroverted testimony
 14 demonstrates that the two payments made within 90 days of the bankruptcy filing were made in
 15 the ordinary course of business pursuant to Section 547(c)(2) of the Bankruptcy Code and
 16 therefore may not be avoided as preferential transfers. Since the alleged receipt of purported
 17 avoidable transfers constitutes the sole basis for objecting to the Bunches' claim and valuing the
 18 same as zero for voting purposes, the Bunches' Motion for Temporary Allowance should be
 19 granted by this Court.

20 B. The Harsh Approach Advocated by the Bankruptcy Courts in Texas is not Uniformly
 21 Accepted by Other Bankruptcy Courts and Should Not be Applied in this Case Because
of the Extreme Inequities in Doing So.

22 In support of its objection, USACM cites several cases from Bankruptcy Courts within
 23 the various Districts of Texas for the proposition that where a claimant has potentially received a
 24 preferential transfer, such claimants' votes should be estimated at zero for voting purposes. See
 25 In Re Coral Petroleum, Inc. 60 D.R. 377 (Bankr. S.D. TX 1986); and In Re American Solar King
 26 Corp. 90 B.R. 808, 828 (Bankr. W.D. TX 1988). This position is not uniformly adopted by the
 27 Courts.

28 . . .

For example, in the United States Bankruptcy Court for the Western District of Oklahoma, the Bankruptcy Court held that transferees who allegedly receive avoidable preferential transfers would have their claims temporarily allowed in the scheduled amount or amounts set forth in the transferees' proofs of claim for purposes of voting on a plan of reorganization. In Re Amarex, Inc. 61 B.R. 301 (Bankr. W.D. OK 1985). In In Re Amarex, the Bankruptcy Court determined that it must exercise its equitable powers concerning allowance or disallowance of claims at various stages of the case. The Court couched this determination as a question of equity with respect to voting rights. This was particularly true, whereas in In Re Amarex, temporarily disallowing claims have then disenfranchised a substantial part of the unsecured claims. As a result, the Court concluded as follows:

To allow them to vote on the plans, even though some may be eventually disallowed for purposes of distribution, is more in keeping with the spirit of Chapter 11 which encourages creditor vote and participation in the reorganization process.

The decision and reasoning of the court in In Re Amarex, is the better approach. This is particularly true in this case. First, the Bunches have presented evidence demonstrating that any payments received within 90 days of the Bankruptcy Petition were made in the ordinary course of business pursuant to a very long standing history of payments under the Promissory Note. Second, it would be extremely inequitable to disallow the Bunches' claim in excess of \$11,000,000.00 where the alleged preferential transfer comprises only .036% of the overall claim. Finally, it must be remembered that USACM solicited the Bunches' ballot and did not object to their claim until after the ballot was cast against confirmation. One must question whether it is appropriate for a plan proponent to disenfranchise a creditor after soliciting votes simply because the plan proponent did not like the result.

C. The Cases Cited by USACM for Disallowance Under Section 502(c) are Completely Inapposite and Therefore Not Applicable.

In support of its objection, USACM suggests that estimation under Section 502(c) may result in the estimation of a claim at zero for purposes of voting. The primary case cited by USACM in this regard is In Re Corey 892 F.2d 829, 834 (9th Cir. 1989). In In Re Corey, the

1 claims that were sought to be disallowed were for unliquidated and contingent sums predicated
2 upon such legal theories as "emotional distress."

3 In this case, the Bunches' claim is not contingent or unliquidated. Rather, the Bunches'
4 claim is for a sum certain pursuant to the terms of a Promissory Note with accompanying
5 detailed calculations. As such, the points and authorities cited by USACM are inapposite and
6 should not be relied upon by this Court.


7 **CONCLUSION**

8 Based upon the points and authorities presented to the Court as well as the evidence at
9 hearing, the Bunches request that the Court temporarily allow their claim for voting purposes in
10 the full amount set forth in the Proof of Claim of \$11,358,662.28.

11 Respectfully Submitted,

12
13 DATED this 20th day of December, 2006.

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15 **SANTORO, DRIGGS, WALCH,
16 KEARNEY, JOHNSON & THOMPSON**

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